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SOUTH CAROLINA'S JUDICIAL SYSTEM: REFORM IN A TRADITIONALISTIC SETTING

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Since the 1970s, South Carolina's judicial system has experienced a remarkable transformation. Spurred on by a nation-wide effort to modernize court operations, the state government has implemented a variety of reforms that are intended to simplify the judicial structure, to enhance the courts' ability to process cases efficiently, and to ameliorate such age-old problems as antiquated procedures and overlapping jurisdictions. Although these reforms have not placed South Carolina in the forefront of the judicial modernization movement, they have certainly improved the operation of the courts and altered many of the traditional power relationships that once characterized the State's legal system.

The purpose of this article is to provide a comparative assessment of South Carolina's courts. Specifically, the progress of judicial system reform in the State is evaluated in the context of developments that have swept across the United States during the past three decades. The inquiry is intended to determine if the State's judicial system has progressed beyond its highly traditionalistic roots, and to speculate as to probable direction of future reform attempts.

Courts and Political Culture

Judicial systems are, by almost any standard, the most traditional of all political institutions. This fact is attributable to at least two characteristics of the judicial branch of government. First, the courts' focus on law and procedure breeds conservatism. This phenomenon is evident in the judges' adherence to *stare decisis* (common law precedent), in the legal profession's fixation on Latin terminology and archaic courtroom theatrics, and in the judiciary's

fervent belief (one that is not always followed in practice) that due process considerations take precedence over the needs for political responsiveness, budgetary exigencies, or other competing demands. Providing litigants with fair and impartial hearings is the putative goal, one that relies heavily on time-honored traditions. Within this milieu, the status quo is a seductive mistress.

This affection for tradition is reinforced by the dynamics that surround the judicial system's place in the governmental system. From its earliest origins in England, our justice system has exhibited a conservative bent. Having been created and staffed by elites within political and economic communities, American courts long served the interests of legislative bodies and the propertied classes. Although this situation has changed (at least in some areas) over the past 50 years, the fact that courts are political institutions with strong ties to "the establishment" cannot be overstated. Even those who argue that "justice is blind" generally admit that status and influence creep through Lady Justice's blindfold.

Despite their obviously political nature, judicial systems typically maintain a polite fiction concerning their appropriate role in the governmental structure. According to accepted convention, the courts were never intended to accommodate changing public fashions, but were supposed to be insulated from the ebb and flow of political strife. As arbiters of controversial public and private disputes, and with the ability to use their powers of judicial review to negate or alter the actions of executive and legislative officials, every societal group has an interest (at least theoretically) in maintaining the courts' impartiality. For this reason, political systems at all levels of government within the United States have long paid lip service to the virtues of judicial independence.

For the first 150 years of our nation's history, state court systems rarely (if ever) approached the idealized version of independence that is popularized in high school civics books. The courts were snared in a sticky political web; most were completely reliant upon the other branches of government for financial support, personnel, and even the procedures that they followed. At the urging of such groups as the American Bar Association and the American Judicature Society, however, state legislatures in this century began to

take steps toward the creation of truly independent judiciaries. In addition to being provided with greater control over their own operations, the entire system of justice delivery in many states was simplified and modernized. Because this process of court reform is relatively recent, and since most states started from about the same place in their journeys toward judicial modernization (i.e., the typical court system started out as a vassal of the legislature), a status report on the progress that has been made can provide some revealing insights into the state's underlying political culture.

What traits should we expect to find in states with differing political cultures? If we adapt Daniel Elazar's celebrated typology (moralistic/ individualistic/ traditionalistic) to the courts,¹ it would probably be safe to conclude that judicial independence and neutrality are most highly valued in a moralistic political culture. In the pursuit of "the public good," the integrity and independence of the state's judicial system must be beyond reproach. Thus, we would expect the court system to be relatively autonomous of legislative or executive involvement. Judges would be selected in a relatively neutral and equitable fashion, the judiciary's operating budget would be secure from political manipulations, and judicial procedures would be the exclusive province of the judges, not the legislature. In other words, judges would rule their own house with a minimum of legislative or executive intrusion.

Courts within an individualistic culture, in slight contrast, would most likely emphasize such traits as efficiency and responsiveness to public demands. Measures aimed at making the courts accessible to the public would be of primary concern. In an individualistic setting, then, we would anticipate the widespread use of small claims courts, night courts, alternative dispute resolution (ADR) techniques, and other innovations that encourage the speedy settlement of legal controversies. Instead of promoting the interests of society's "haves"—a common phenomenon among judicial systems in every political setting²—the judiciary would strive to level the playing field. Groups such as landlords, creditors and employers would begin to lose their long-standing advantages in the judicial system in response to demands from tenants, debtors and employees. Likewise, a premium would be placed on modernizing and streamlining judicial procedures

due to the fact that such measures would further enhance the courts' ability to serve the public's private needs.

Judiciaries in traditionalistic political cultures, conversely, can be expected to be neither responsive nor independent. As instruments of the political elite, the courts would likely be kept in a subservient role vis-a-vis the legislative and/or executive branches of government. Politically charged judicial selection would be a probable fixture, as would external controls over the judiciary's procedures, personnel, and budgets. There would be few evident attempts to enlarge the public's access to the courts, and even fewer measures designed to reverse the traditional advantage of society's "haves" over the "have-nots". The courts would be a conservative organ of the existing power structure. Serving the elites would thus take precedence over such competing values as efficiency, professionalism, responsiveness to the public, or impartiality.

Court Reform Comes to South Carolina

In order to place South Carolina's judicial system in its appropriate political context, it is first necessary to review the situation before and after the reform movement. As was the case virtually everywhere, the State's court system evolved over many years in a haphazard and even chaotic fashion. The General Assembly, which had seized control of the judicial branch immediately after the Revolution, distrusted the idea of an independent judiciary due in part to lingering memories of the abuses that had occurred under the King's courts. Later, the legislature's suspicion of the legal system was heightened by the attempts of some state judiciaries (but not South Carolina's) to negate legislative actions through judicial review.³ Fears of similar behavior in this State, coupled with the low professional status of the legal profession, eliminated any reluctance that the General Assembly might have had toward meddling in judicial affairs.

Instead of vesting significant powers in legislative committees or a central appellate court, the General Assembly followed a "strategy" of decentralization under which specialized courts were created for cities and counties whenever the apparent need arose.

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Because the legislature directly selected much of the judiciary, and because the costs of new courts were largely borne by the jurisdictions in which they were located, courts sprung up like mushrooms across the South Carolina landscape. The General Assembly quickly developed a penchant for electing its own members, or close friends of influential legislators, to most of the new judgeships. Meanwhile, the process of court creation intensified throughout most of the late 19th and early 20th centuries. The movement was spurred by urbanization and industrialization, both of which led to increased levels of litigation and related demands for new types of courts to deal with emerging classes of disputes (such as juvenile, landlord-tenant, and divorce cases).

A predictable consequence of this evolutionary process was that the resulting judicial "system" was little more than "a hodgepodge of courts, lacking in uniformity and consistency."⁴ Many of the courts operated semi-autonomously, thereby developing highly inconsistent procedures and jurisdictional responsibilities. In addition to creating confusion among citizens and attorneys, this situation resulted in significant differences in the quality of judicial services between and among counties. The chaotic state of affairs prompted legal scholars to apply such terms as "administrative swamp" and "judicial anarchy" to the local justice system.⁵

The extent of South Carolina's problem was brought into sharp focus in 1971, when the Institute of Judicial Administration (a national reform group) concluded that the existing labyrinth of courts with overlapping and inconsistent jurisdictions "defies classification".⁶ A diagram of the state court system indicated that six types of trial courts existed (magistrate, municipal, probate, domestic relations and children's, county, and circuit), yet no single judicial district contained all of the types represented. Moreover, the pattern of lines of appeals varied. Cases appealed from municipal court could, in some counties, be taken to the county courts, while in other counties these cases were reviewed by circuit courts. Adding to the confusion was the fact that some county courts could hear only civil cases, with the jurisdictional amounts varying by court, while others heard both civil and criminal litigation.⁷

By the early 1970s, enormous pressures for court reform were building within the legal profession and the public at large. These forces were stimulated by a variety of factors, including dissatisfaction with the different courts' vague and conflicting jurisdictions, a growing problem with court delay, unevenness of judicial workloads, and archaic facilities and recordkeeping practices.⁸ After two centuries of thoughtless inattention, the State's court system seemed to be serving no one's interests, save for a small group of judges and well-connected associates.

Thanks largely to the efforts of a small group of progressive legislators, who were motivated by a bar-sponsored citizens' movement, court reform finally arrived in South Carolina in 1972. In that year a revised version of the Judicial Article of the State Constitution was approved by the voters. This article was intended to establish a "unified court system" with consistent legal procedures and uniform avenues of appeal. Although the Article formally took effect in 1973, it did not immediately transform the state's courts. Instead, the Article merely stated broad intentions regarding the structure and administration of the unified court system, leaving the specifics to be worked out over time. Thus, the revision of the Judicial Article set a gradual and continuing process of court reform into motion.

Conventional Wisdom of Court Reform: Attack on Traditionalism

Before exploring the specific changes that have occurred in South Carolina's courts in the recent past, the reform tradition that spawned these developments needs to be briefly examined. The conventional wisdom of court reform first began to take shape in a 1906 address to the American Bar Association by Roscoe Pound, Dean of the Harvard Law School. Pound chided his colleagues for their complacency in the face of judicial ineptitude, and criticized three specific aspects of court administration: court multiplicity (the existence of too many specialized courts), concurrent jurisdictions (overlapping jurisdictions that permit litigants to select the courts to which they will take their cases), and the resulting waste of judicial manpower.

In effect, these criticisms were an attack on the traditionalistic practices that were prevalent in almost all states. Pound's proposed solutions, meanwhile, are grounded largely in the themes that permeate both moralistic and individualistic cultures. He argued that judicial branches ought to be granted their independence from legislative bodies. To accomplish this ambitious objective, he advocated the creation of "unified court systems" under which the state's supreme court would have administrative, budgetary, and procedural control over all lower courts. In addition to granting the courts their independence, the unified court concept implicitly advanced the goal of making judicial systems more businesslike and efficient. By eliminating legislative intrusions, and by providing the judiciary with a clear administrative master, Pound hoped that the courts would begin to function in a more responsible and effective manner.

Although Pound's indictment of the courts was not originally well received by the legal profession, by 1938 the ABA had adopted many of his proposals in its resolutions for judicial reform. These resolutions, known as the Parker-Vanderbilt Standards,⁹ called for a unified judicial organization in which the state's highest court would be granted full administrative and rule-making authority over the entire court system. These reform suggestions were expanded by the 1962 ABA Model State Judicial Article. In addition to advocating simplified judicial structures and clear lines of administrative authority, the Model Article included pleas for merit selection of judges, the appointment of professional court administrators, and judicial discipline and removal mechanisms.¹⁰

The latest and most sophisticated reform recommendations, the 1990 ABA Standards Relating to Court Organization,¹¹ continue to emphasize the themes of judicial independence and administrative efficiency. The ABA's clear goal is to empower state court systems by giving them centralized control over all facets of their operation, and to ensure them a steady and reliable source of revenue that is not dependent upon the other branches. Included within the ABA's most strident suggestions are the elimination of all specialized courts, the vesting of unrestricted administrative authority in the state's highest court (or its chief justice), state financing of the judicial system (to eliminate the courts' reliance on unpredictable funding sources,) and

merit selection of judges (to reduce the likelihood that incompetent judges obtain their positions through politicized, corrupt, or otherwise unseemly processes). Obviously, this list of reforms echoes many "good government" themes, along with an undertone of "administrative management" practices. Both moralistic and individualistic elements are clearly evident.

The Tense Path Toward Reform

Compared to the anarchy that prevailed prior to the adoption of the new Judicial Article (Article 5), the current court system in South Carolina is a model of simplicity and order. Although the improvements did not always occur smoothly, the General Assembly deserves credit for permitting the reform process to continue, however gradually or reluctantly.

The most significant component of Article 5 originally stipulated that "the judicial power of the state be vested in a unified judicial system which shall include a Supreme Court, a Circuit Court, and such other courts of limited jurisdiction as may be provided by general law." The Article went on to note that "any existing court may be continued as authorized by law until this article is implemented pursuant to such schedule as may hereafter be adopted."

In effect, these provisions established a two-tier court system (Supreme Court and Circuit Courts) but did not preclude the possibility that existing specialized courts could continue indefinitely. Moreover, the Article was sufficiently vague to leave the question open as to whether or not the General Assembly was empowered to create new courts that were not formally included in the unified system.

This situation resulted in a series of confrontations between the General Assembly and the Supreme Court. In 1975, for example, the Supreme Court reviewed the constitutionality of 29 statutes dealing with the court system that had been passed after the adoption of Article 5. These statutes created new local courts, added judgeships to courts that already existed, and altered and/or established courts in the probate court system. In every instance, the Supreme Court ruled that changes in the judicial system that did not conform to the unification

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requirement of Article 5 were unconstitutional. This series of skirmishes was temporarily resolved in 1976, when the General Assembly finally moved to implement a unified court structure. Specific steps included the creation of a coherent family court structure in 1977, the phase-out of county courts "and other similar courts inferior to the circuit court" by 1979, and arrogation of authority over these lower courts to the unified court system.¹²

Despite these important advances, however, relations between the General Assembly and the judiciary were anything but cordial. For example, conflict erupted between 1979 and 1984 when the Supreme Court's plea for the creation of an Intermediate Court of Appeals was used by the General Assembly as a means to reassert its control over the administrative and rulemaking authority of the unified court system. In a tug-of-war spanning five years, the General Assembly attempted on different occasions to dilute the Supreme Court's rulemaking authority by granting the new appeals court (instead of the Supreme Court) control over its own internal procedures, and by making all rulemaking actions of the court system "subject to and not inconsistent with statutory law."¹³ The General Assembly's irritation with the judicial branch had been inflamed in 1979 when the Supreme Court declared that the legislature could not appoint four of its incumbent members to seats on the new appeals court (which had been created on a temporary basis by statute). That action was ruled invalid because it conflicted with a statute that prohibited any legislator from being elected to an office created during his/her term in the General Assembly.

After five years of highly embarrassing squabbles, a truce was finally declared in 1984. The Court of Appeals was permanently established through a constitutional referendum, and the General Assembly abandoned its attempts to take back the Supreme Court's hard-won authority over management and rulemaking for the unified judicial system. Relative peace has prevailed since 1984, save for intermittent controversies surrounding judicial elections.

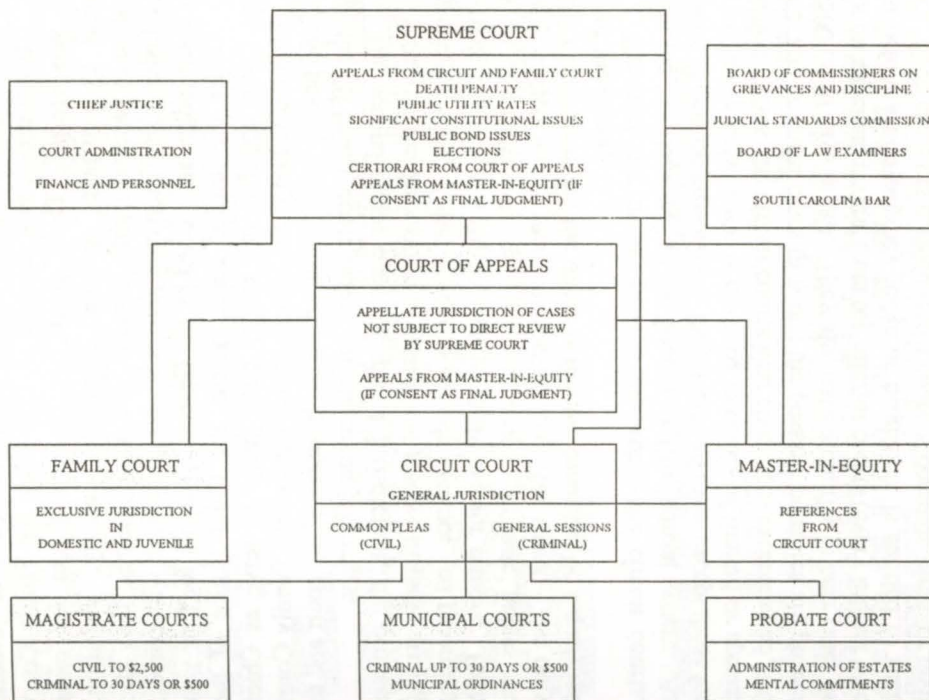
The Reformed Judicial Structure

The gradual revisions in court structure have resulted in a table of judicial organization that is not extremely different from the one advocated by the ABA standards. Compared to the confusing array of courts that existed prior to reform, the system presently consists of a two-tier trial court arrangement and two levels of appellate courts. Additionally, the system contains a number of specialized courts at the local and county levels (Figure 1).

The most numerous courts in the State are "limited jurisdiction," meaning that they are restricted to hearing minor criminal and civil cases. The State's 295 (approximately) magistrate courts have jurisdiction over criminal offenses "subject to the penalty or fine not exceeding \$500 or imprisonment not exceeding 30 days."¹⁴ Their civil jurisdiction extends to cases involving up to \$5,000. The 201 municipal courts, which can be created by action of any local governing body, have no civil jurisdiction. Their criminal jurisdiction is identical to that of the magistrate courts; they are intended to adjudicate minor legal violations that occur within the city boundaries. Many municipal courts are staffed by magistrates in contractual arrangements handled through the county governments (for whom the magistrates technically work); the remaining municipal court judges are chosen by their jurisdictions' governing bodies.

Magistrates, whose offices originated during the colonial era, perform two critical functions in addition to deciding cases. They conduct pre-trial and preliminary hearings for all offenders charged with crimes, and they issue search and arrest warrants when probable cause exists. Given this range of responsibility, it is notable that magistrates are not required to be attorneys. In fact, the only statutory requirement is that they be qualified electors in the counties in which they intend to serve. And, significantly, the absence of a law degree does not appear to figure prominently in the selection process; only a small percentage of the sitting magistrates possess formal legal training. They are appointed by the Governor upon the advice and consent of the Senate; under the system of "senatorial courtesy," this means that Senators effectively control magisterial appointments within their counties.

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The next highest tier of courts includes two "special jurisdiction" bodies, family courts and probate courts. Prior to court reform, several counties contained no special courts for family matters while others employed either domestic relations courts or juvenile courts. This situation was resolved in 1976 when the Family Court System was created. These courts are the sole forum for cases pertaining to marriage, divorce, separation, custody, visitation, termination of parental rights, alimony, and name changes. They also have exclusive jurisdiction over juveniles who are charged with crimes. Family court judges are elected by the General Assembly for four-year terms. Under the unified court system, the Chief Justice of the Supreme Court appoints one family court judge to serve as Chief Judge. This individual is the administrative head of the Family Court system, and has the power to supervise the business of the court and to reassign the 49 family court judges for maximum efficiency.

The second major court of special jurisdiction, the probate courts, supervise the disposition of estates and resolve disputes arising from contested wills. Other functions include issuance and recording of marriage licenses and supervision of guardians for minors. Each county in the State contains a probate court. Probate judges are popularly elected within their counties to four-year terms. The only statutory requirement for the office is that the candidate be a qualified elector of the county.

The next tier in the judicial hierarchy, the circuit courts, represent the "workhorses" of the South Carolina judicial system. As trial courts of general jurisdiction, they decide all cases except those for which exclusive jurisdiction is reserved to courts of limited or special jurisdiction. Thus, the circuit courts hear civil cases exceeding \$5,000 in value, and criminal cases in which the possible penalties are greater than \$500 or 30 days in jail. They also have authority to hear cases *de novo* or on appellate review from the inferior courts (every litigant who is tried before a non-attorney judge or magistrate is entitled to such review). Each circuit is divided into a court of common pleas for civil matters and a court of general sessions for criminal cases. The state is currently divided into 16 judicial districts which range in size from two to four counties. The General Assembly, which elects circuit court judges, has set the number of judgeships at 43. Each district in the

state is assigned a resident judge, and the remaining judges are subject to rotation within their own circuits or to other circuits if a caseload imbalance is present.

The state's appellate courts consist of the Supreme Court and the Court of Appeals. The Supreme Court, which is composed of a Chief Justice and four associate justices, is primarily occupied with reviewing cases that are appealed to it on errors of law. Beyond its decision-making capacity, the court has extensive responsibility and power as the procedural rule-making and administrative authority for the unified judicial system. Justices of the Supreme Court are selected by vote of the General Assembly to serve ten-year terms.

With the creation of the Court of Appeals in 1983, the Supreme Court reserved jurisdiction over cases on certiorari (discretionary appeal) from the new appellate courts, as well as five classes of appeal directly from lower trial courts. These include cases involving the death penalty, public utility rates, major constitutional issues, public bond issues, and the election laws.¹⁵ All other classes of appellate litigation are now heard by the Court of Appeals, which was created expressly to reduce the Supreme Court's decisional burden. This intermediate appellate court consists of a Chief Judge and seven associate judges who are elected by the General Assembly to staggered terms of six years.

Assessing the Reforms: How Does South Carolina Compare?

As has been noted, South Carolina's current judicial system represents a profound improvement over the depressing situation that existed prior to the revision of Article 5. Many of the worst vestiges of the old traditionalistic system have been abolished and replaced with structures and practices that adhere fairly closely to the ABA's prescribed model. Each step toward a unified court system takes the system farther away from its tradition-bound past.

Despite making impressive strides, however, the state's courts do not always compare favorably with the level of progress that has been made elsewhere. Some of the remaining problems are relatively minor, yet others constitute serious challenges to the reform

agenda and to the courts' efforts to modernize and to reinforce their fledgling independence.

Structural Comparisons: A Status Report

The creation of the unified court system is clearly South Carolina's most significant reform achievement. Although impressive structural alterations have been implemented, the system remains a considerable distance from the model espoused by the ABA. The primary area of inconsistency concerns the ABA recommendation governing trial courts of original jurisdiction. The ABA prescribes a single court with general jurisdiction over all civil and criminal matters. This idea dates all the way back to Roscoe Pound, who argued for "specialized judges, not specialized courts!"¹⁶ Where this format has been employed in other states, the court is usually divided into judicial departments that specialize in various classes of disputes (e.g., civil, criminal, traffic, probate, juvenile, domestic). By placing all of these judicial functions in one court, under a single chief (administrative) judge, most commentators agree that judicial efficiency will improve and the consistency and quality of justice will be enhanced.

In order to conform to the "ideal" structure, South Carolina would need to abolish several courts—magistrate, municipal, family, and probate—and assign their functions to the circuit courts. Because of the existence of these special and limited jurisdiction courts, the state ranks in the bottom 40 percent of all states on a "court consolidation and unification" scale.¹⁷ Although less than ten states currently have just one trial court of general jurisdiction, over 30 states contain judicial structures with fewer separate courts than are now present in South Carolina. The most common arrangement is a two-tier court structure consisting of a county court (limited jurisdiction) and a circuit (often called "superior") court of general jurisdiction.

Perhaps the most disturbing trait of the current arrangement is the continued presence of restricted jurisdiction courts staffed by non-attorney judges. Astoundingly, magistrate and municipal courts adjudicate over 1.5 million cases per year,¹⁸ a number that far exceeds the total output of all the other courts combined. Even though

these cases are relatively "minor" (predominantly traffic offenses, ordinance violations, and minor civil claims), the involvement of non-attorney judges raises serious questions about the quality and fairness of the proceedings.

Administrative Arrangements: Not Quite Independent

Prior to reform, South Carolina's courts were a leaderless array of loosely connected entities. Except for the General Assembly, which frequently imposed rules and regulations, there was no administrative accountability. Without any coherent direction, personnel were not efficiently utilized, financial resources were maldistributed, and the courts' operating practices varied widely across the state.

The revision of Article 5 addressed these traditional dilemmas by vesting administrative and rule-making authority within the Supreme Court. Under Section 4 of the Article, the Chief Justice is designated as the administrative head of the unified judicial system. To carry out his administrative mission, the Chief Justice has constitutional power to appoint an administrator for the courts and such assistants as he deems necessary. Consistent with ABA recommendations, the Office of South Carolina Court Administration was established in 1973 to serve as the Chief Justice's administrative support staff. The diverse functions of this office include: case tracking, calendar management, provision of legal education for judges and other personnel, and statistical compilations to aid the Chief Justice in making decisions concerning resource allocations, the assignment of judges, and revisions in judicial rules and procedures.

Collectively, these reforms provide the unified court system with an unprecedented amount of control over its own affairs. If we focus only on the concrete indicators—the existence of constitutional, administrative, and rulemaking authority within the court system, coupled with a cadre of professional court administrators—South Carolina's courts are in remarkable conformity with the reform literature, as delineated by the ABA standards. The changes have enabled the Supreme Court to continually refine rules and procedures,

to allocate resources more efficiently, and to implement a coherent and effective system of operating practices.

While, once again, South Carolina's judicial reformers have reason to be proud of their accomplishments, clouds continue to lurk on the horizon. True judicial independence—at least as it is articulated by the ABA and other reform groups—cannot be achieved until additional changes are made. One of the most troublesome facets of the current arrangement is the continued ability of the General Assembly to negate judicial rules if it so desires. Although legislators have not used their powers to meddle with great frequency, the fight over the Court of Appeals discussed earlier serves as an implicit warning to the Supreme Court that the General Assembly might at any time insert itself into the internal affairs of the unified court system.

Another impediment to independence arises from the court systems' lack of control over many quasi-judicial personnel. Purists within the court reform community contend that true self-determination cannot be achieved until the judiciary exercises managerial supremacy over all the employees who work within it. No other organ of government is as dependent upon personnel who are provided by external groups as are the courts. For example, courts rely upon the services of court reporters and stenographers (who are often provided by county government through contractual arrangements), bailiffs (who are supplied by elected sheriffs), and deputy clerks (who are employed by county government through the court clerks' offices). Each of these workers plays a significant role in the operation and maintenance of the judicial system, yet none works directly *for* judges. This situation is especially troublesome in regard to court clerks, who in South Carolina are popularly elected within each county. These individuals are important judicial actors in that they are responsible for courthouse operations, recordkeeping, disposition of fines, and entry and preservation of calendars and dockets. If an incompetent or even illiterate court clerk happens to be elected—a scenario that has actually occurred on occasion—the impact on the justice system can be quite serious.¹⁹ For this reason, court reformers strongly endorse the idea that court clerks be appointed, not elected, and that other auxiliary personnel be minimally subject to judicially-enforced performance requirements.

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The final shortcoming in the courts' attempt to achieve independence stems from their continued dependence upon the other branches of government for financial support. All reform groups agree that judicial systems should be empowered to prepare and allocate their own budgets, and that the state should completely fund judicial expenditures. The fiscal status of South Carolina's courts, however, continues to be highly decentralized. Many judicial personnel are paid from county or city funds, and most of the state's judicial facilities are maintained by local government. Moreover, even that portion of the court budget which is state-funded is the exclusive province of the other branches. The State Budget and Control Board is responsible for preparing the budget for consideration by the General Assembly. This situation has been an intermittent source of friction between the judicial and legislative branches. A recurrent complaint is that the courts are being "starved" by the legislature, an allegation that is substantiated by unprecedented case backlogs at every level of the system. In response to the court delay dilemma, and bolstered by a former Chief Justice's comment that the courts are "overextended, understaffed, and overwhelmed," the General Assembly added nine new judgeships early in 1996.²⁰

Relative to other states, South Carolina's method of financing the courts is not very atypical. Of the reform proposals contained within the ABA standards, state governments have been most reluctant to institute full state financing of the judicial system. Likewise, there has not been a headlong rush to grant supreme courts unilateral control over all budgetary matters. So, on this dimension at least, the state's level of modernization does not lag significantly behind that which exists elsewhere in the United States.

Judicial Selection: Tradition Reigns

Next to court unification, the most enduring theme of the national court reform movement is merit selection of judges. This has been a central component of every reform proposal that has been issued in the past 50 years.²¹ Although the specifics vary, the basic purpose of merit selection is to establish a neutral screening system that

emphasizes judicial candidates' qualifications and competence over political considerations. Ordinarily, this is accomplished by turning the screening process over to a nonpartisan nominating commission composed of both laymen and legal professionals. Upon nomination, candidates are appointed by the governor, after which they typically must stand for a retention election within a specified period of time (usually one year).²²

Prior to the advent of the court reform movement, the judicial selection strategies that were used in most states were little more than accidents of history. That is, they reflected the ideas regarding judicial selection that were dominant at the time the states' constitutions were adopted.²³ Thus, states of the original 13 colonies favored legislative election or gubernatorial appointment, while states that entered the Union during the Jacksonian period opted for popular election. These forms of selection did not begin to be displaced until the 1940s, when the first merit plans were proposed. Since that time, 35 states have implemented merit screening programs for some or all of their judges.²⁴ Of the nine states that once used legislative elections to select judges, only Virginia and South Carolina retain that format.

To assert that legislative election of judges has experienced a "checkered past" is a gross understatement. As it has traditionally been conducted, and as it carries on today, the process is perhaps the most flawed and corrupt approach to judicial screening that has ever been devised. Each judicial election reinforces disturbing lessons about the system's failings. Moreover, the legislature's "track record" in this regard provides telling evidence that traditionalistic tendencies continue to exert tremendous influence on the policymaking process.

The flaws of legislative selection, and the horror stories surrounding particular contests for seats on the bench, are almost too numerous to detail here. First, consider the fact that 70 percent of the circuit court judges, all of the Supreme Court justices, and three Court of Appeals appointees are former members of the General Assembly. Given these figures, one can only conclude that legislative service is almost a prerequisite for judicial appointment. When non-legislators compete for positions on the bench, they almost always lose to legislators. This situation clearly discourages many qualified applicants from seeking judicial appointments, thereby narrowing the field to a

tiny group of well-connected politicians and their cronies.

Having already restricted the applicant pool, legislative selection's next offense is to virtually ignore the qualifications of the candidates for judicial office. Between 1992 and 1996, for instance, the General Assembly re-elected two circuit judges who had been reprimanded for ethical misconduct, elected a House member who was deemed "unqualified" by the General Assembly's own judicial screening committee, re-elected a circuit judge who most members conceded "didn't understand the law," and elected an appellate court judge who was evaluated as the least qualified of the three candidates for that particular seat. Early in 1996, moreover, the General Assembly elected a House member to a seat on the Court of Appeals over another candidate who is widely regarded as the best circuit court judge in the state. To make matters worse, the winning candidate "flunked the bar exam twice, and was rated unqualified for the bench by the state Bar."²⁵ Incidents such as these led one reform-oriented legislator to remark, "The politics in judicial races defies gravity . . . cream doesn't rise to the top, it goes to the bottom."²⁶

In addition to staffing the judiciary with judges who are undoubtedly less qualified than they could be, legislative selection results in many ugly displays that degrade the process. Because seats on the bench are such valued plums, each selection is marked by strong lobbying efforts, vote counting, "horse trading," and arm twisting. Candidates for judgeships circulate through the State House, slapping backs and collecting commitments for votes (even though it is technically illegal for a candidate to ask for votes prior to being cleared by the judicial screening committee).

The contests have become so politicized that, just recently, a new and even more disturbing trend is developing. Candidates for re-election to the bench are increasingly facing opposition, a practice that rarely occurred until the 1990s. Campaigns against minority judges (especially women) appear to be particularly intense. The failure of a family court judge to win re-election in 1995 marked the first time in the current century that a sitting judge was removed by the General Assembly. Soon thereafter, however, the General Assembly subjected the only female Supreme Court justice to an embarrassing round of public hearings. Despite being the acknowledged "intellectual giant" on

the Court, she was forced to defend herself against charges that she was too blunt and insensitive with her support staff. Lurking behind the charade were allegations from some politicians that she was too liberal, too "pro-tax," and that she had offended the Governor's father by deciding against him in a civil case. Although she won re-election, the process set off at least two alarm bells: that all judicial re-elections will now be contested events, and that a judge's political ideology and decision history will become important considerations in future elections.²⁷

The stink emanating from the General Assembly's recent record of judicial elections is spurring renewed efforts to reform the process. Although no one has seriously proposed a merit selection protocol that removes the ultimate decision power from the legislature, a House-passed measure would at least begin the reform process. The bill would tighten qualifications for judges, prohibit sitting legislators from running for the bench, establish an impartial commission of laypersons and attorneys to nominate candidates, and deny any candidate the right to run without the commission's approval. Because a two-thirds majority of the Senate is needed to pass the measure (a constitutional amendment), its prospects are dim.²⁸

Is the Verdict In?

Based on the accomplishments to date, can a definitive judgment be rendered concerning the status of South Carolina's judicial system? Have they been reformed sufficiently to be termed "modernized," or do traditionalistic values still dominate?

Weighing heavily on the positive side of the ledger is the impressive assortment of court reforms that have been engineered during the past three decades. Court consolidation and simplification have progressed nicely, bringing order and continuity to a system that was once irrational. The creation of a unified court system gives judges many of the necessary tools to accomplish their tasks efficiently. Centralized rule-making and administrative authority provide the court system with the highest level of autonomy that has ever been present in the state's courts. Thus, both moralistic and individualistic

objectives have clearly been achieved. The courts are far more independent than they once were, and their performance and accessibility to the public have unquestionably been improved. In a very real sense, the progress has been astounding. If evaluated purely on the basis of the reforms that have occurred within the borders of the state, even the most cynical observer would have to conclude that traditionalism has yielded some of its influence.

If, on the other hand, one wishes to assess the South Carolina experience in the context of other political settings, there is less cause for optimism. Troublesome pockets of traditionalism remain in many prominent facets of the judicial system. By far the most egregious is legislative selection of judges, but other threats to the courts' independence also persist in the rule-making process (where the General Assembly retains veto power over the Supreme Court's actions), financial affairs (where the unified court system's dependence upon the other branches is nearly absolute), and in the management of auxiliary personnel (who are often beyond the courts' direct supervision).

In addition to these apparent shortcomings, South Carolina's courts risk falling even further behind their counterparts in other states in a number of emerging areas. Perhaps the most notable contemporary trend in court management is the explosion of efforts to make state courts more accessible and responsive to the public.²⁹ Large numbers of states have recently encouraged the use of "private judging" (privately-retained mediators), ADR strategies (which are publically funded) and night courts. These measures not only ease the public's access to judicial services but also reduce backlog and delay, a benefit that is sorely needed in South Carolina. Except for the growing use of ADRs (especially in child custody, employee grievance, and automobile accident cases), the state's use of such techniques is fairly limited.

Other trends that seem to be commonplace elsewhere are concerted programs to promote equity in the courts and to evaluate judicial performance. Task forces have been created in 39 states to examine gender and racial bias in the justice system.³⁰ By examining such processes as judicial selection, bail practices, sentencing, and the handling of domestic violence cases, the states hope to minimize

discriminatory procedures and behaviors. Judicial performance evaluation efforts, similarly, have the dual purpose of expanding citizen participation in the judicial system while also improving the quality of the judiciary. Typically, such programs encourage the public to get involved in the review and evaluation of judicial performance, and in filing complaints where misconduct is evident. South Carolina, in contrast, has not yet launched any systematic anti-discrimination program, and operates "one of the most secretive disciplinary processes for judges and attorneys in the nation."³¹ The openness of any governmental system to public scrutiny and participation is an excellent measure of progressivism and modernity; on this basis, South Carolina's court system does not measure up.

One final aspect of judicial behavior deserves a brief mention. Since the 1960s, courts in many locations have provided society's less influential citizens with a voice that they are unable to obtain in the other branches of government. Courts in conservative political cultures tend to defend the status quo "through veto and delay,"³² while those in more progressive settings have been active in furthering the rights of the downtrodden. They innovate, develop new policy, and expand the rights of litigants. This latter trend is especially prevalent in regard to four classes of litigation: property law, contract law, tort law, and civil liberties.³³ Insofar as South Carolina is concerned, a predictable pattern is evident. Except for one case that opened government jurisdictions to tort liability,³⁴ and another that was unusually gracious to employees,³⁵ the state's judiciary has interpreted the law in a highly narrow and conservative fashion. More often than not, the interests of the established order prevail over those of the less well-connected.

In summary, then, a mixed verdict seems inescapable. South Carolina has made substantial progress, but its courts do not yet reflect the characteristics that would be expected in either a moralistic or individualistic setting. Due to pressing economic demands, the most likely direction of continuing change will be toward business-like practices. Little resistance to the continued refinement of judicial procedures, and the addition of labor-saving innovations, is likely to occur. Opposition to modernization seems most probable where basic "who gets what" questions are addressed. Therefore, we can expect the General Assembly to resist merit selection and to strive mightily to

maintain other controls over the judicial system. To the extent that the legislators are successful, the state's courts will retain much of their traditionalistic character.

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Endnotes

1. Daniel J. Elazar, *American Federalism: A View From the States* (New York: Thomas Cromwell, 1972), Chapter 4.
2. Lawrence Baum, "State Supreme Courts: Activism and Accountability," in Carl E. Van Horn (ed.), *The State of the States* (Washington, DC: Congressional Quarterly Press, 1989), pp. 103-130.
3. Robert Carp and Ronald Stidham, *Judicial Process in America*. (Washington, DC: Congressional Quarterly Press, 1993), pp. 52-55.
4. *State ex rel. McLeod v. Court of Probate of Colleton County*, 266 S.C. 284 (1975).
5. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Judicature* 56 (March, 1937), 316-323.
6. Institute of Judicial Administration, *The Judicial System of South Carolina* (Washington, DC: Institute of Judicial Administration, 1971), p. 2.
7. M. Glenn Abernathy, *Organization and Jurisdiction of the Courts of South Carolina* (Columbia, SC: Bureau of Public Administration, 1956).
8. University of South Carolina Law Center, Citizens Conference II, *Modernization of South Carolina's Courts* (Columbia, SC: USC Law Center, 1975)
9. American Bar Association, *Standards Relating to Court Organization* (Chicago: American Bar Association, 1938).
10. National Center for State Courts, *State Courts: A Blueprint for the Future* (Williamsburg, Virginia: National Center for State Courts, 1978).

South Carolina's Judicial System

11. American Bar Association, *Standards Relating to Court Organization* (Chicago: American Bar Association, 1990)
12. South Carolina General Assembly, *Acts and Joint Resolutions*, 1979.
13. A quote from a proposed amendment to Article 5, Section 4, South Carolina General Assembly, 1980.
14. South Carolina Judicial Department, *Annual Report 1994*. (Columbia, SC: Office of State Court Administrator, 1995), p. 9.
15. South Carolina Judicial Department, *Annual Report 1991*. (Columbia, SC: Office of State Court Administrator, 1992), p. 12.
16. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice."
17. Larry Berkson, "Court Unification in the Fifty States." *Judicature* 63 (March, 1980), 320.
18. South Carolina Judicial Department, *Annual Report 1994*.
19. Larry Berkson and Steven Hays, "The Forgotten Politicians: Court Clerks," *University of Miami Law Review* 30 (Spring, 1976), 499-516.
20. Lisa Greene and Cindy Ross Scoppe, "Huff Wins on Home Court," *The State* (February 15, 1996), pp. A1, A7.
21. See, e.g., Patrick Dunn, "Judicial Selection in the States: A Critical Study with Proposals for Reform," *Hofstra Law Review* 4 (Winter, 1976), 267-353.

22. This format is called the Missouri Plan or the Kales Plan, after its originator. An alternative approach, referred to as the California Plan, calls for the governor to nominate a candidate. That person is then screened by a special commission, which can appoint if he/she is suitably qualified. The judge is then expected to stand for popular election after an initial term on the bench.

23. Herbert Jacob and Kenneth Vines, *Politics in the American States* (Boston: Little, Brown and Company, 1976), p. 249.

24. Council of State Governments, *Book of the States 1994-1995* (Lexington, KY: Council of State Governments, 1995), pp. 190-192.

25. "In Appeals Court Race, Odds Favor the Politician," *The State*, (February 13, 1996), p. A10.

26. Cindy Ross Scoppe and Lisa Greene, "Smith Judge Losing Appellate Race" *The State* (February 8, 1996), pp. A1, A7.

27. "Toal Hearings are Fair, But Systems Needs Change," *The State*, (January 28, 1996), p. D2.

28. "Wilkins Uses Muscle in Appellate Judge Race," *The State*, (February 16, 1996), p. A8.

29. Erick B. Low, "Assessing the Judicial System: The States' Response," in Council of State Governments (ed.), *Book of the States 1994-1995* (Lexington, KY: Council of State Governments, 1995), pp. 168-181.

30. *ibid.*

31. Cindy Ross Scoppe, "Opening Up Lawyer Discipline to Cost \$200,000," *The State* (February 21, 1996), pp. A1, A5.

South Carolina's Judicial System

32. Kenneth Dolbeare, "Who Uses the State Trial Courts," in James Klonoski and Robert Mendelsohn (eds.), *Politics of Local Justice* (Boston: Little, Brown and Company, 1970), p. 73.
33. Baum, "State Supreme Courts: Activism and Accountability," p. 104.
34. *McCall v. Batson*, 329 S.E. 2d 741 (1985).
35. *Small v. Springs Industries*, 257 S.E. 2d 452 (1987). This case outlawed "outrageous firings" and stated that the contents of employee handbooks can constitute "implied contracts."